Supreme Court, U.S.
FILED
05-909 JAN 17 2006
OFFICE OF THE CLERK

No. 05-___

In The
Supreme Court of the United States

POWER RESOURCE GROUP, INC.,

Petitioner,

v.

PAUL HUDSON, in his official capacity as Chairman of the Public Utility Commission of Texas, *et al.*

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

BETH S. BRINKMANN
Counsel of Record
SETH M. GALANTER
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-1544

CLIFFORD B. LEVINE
ALICE B. MITINGER
STACEY L. JARRELL
THORP REED & ARMSTRONG, LLP
One Oxford Centre
301 Grant St., 14th Floor
Pittsburgh, PA 15219
(412) 394-7711

January 17, 2006

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the court of appeals violated federal preemption doctrine when it failed to determine whether the state rule at issue frustrates the purpose of the relevant federal statute and regulations, in conflict with the precedent of this Court and that of the majority of lower courts.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, respondents include Julie Parsley and Barry T. Smitherman, both sued in their official capacities as Commissioners of the Public Utility Commission of Texas, and the Texas-New Mexico Power Company.

The Public Utility Commission of Texas, which appears in the caption of the case below, was named as a defendant in petitioner's initial complaint in district court, but was dropped from the amended complaint and was not a party to the judgment below.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Power Resource Group, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED	1
INTRODUCTION	1
STATEMENT OF THE CASE	3
A. The Statutory and Regulatory Framework of PURPA	3
B. The Texas Public Utility Commission Rule at Issue	6
C. Factual and Procedural Background	8
REASONS FOR GRANTING THE PETITION	12
Review Is Warranted To Resolve Disagreement Among The Lower Courts As To Whether A Federal Statute Preempts A State Law That Frustrates The Purpose Of The Federal Statute And Its Implementing Regulations	12
A. The Court Of Appeals Failed To Recognize, Contrary To The Preemption Doctrine Of This And Other Courts, That Because The Texas Rule Frustrates The Central Purpose Of A Federal Statute And Regulations, The Rule Is Preempted	14

TABLE OF CONTENTS – Continued

Page

1. The Fifth Circuit refused to apply the frustration-of-purpose preemption doctrine despite this Court's consistent reliance on that key doctrine 14

2. The lower courts are split on the application of frustration-of-purpose preemption to claims under PURPA 17

3. The disagreement in the lower courts on whether frustration-of-purpose constitutes preemption extends beyond PURPA 20

B. Review By This Court Is Especially Important Because The Court Of Appeals' Ruling Undermines The Proper Functioning Of PURPA 23

CONCLUSION 30

APPENDIX A: Opinion of the United States Court of Appeals for the Fifth Circuit, dated August 17, 2005 ..... 1a

APPENDIX B: Opinion and Order of the United States District Court for the Western District of Texas, dated July 15, 2004 ..... 17a

APPENDIX C: Order of the United States District Court for the Western District of Texas, dated February 18, 2004 ..... 34a

APPENDIX D: Order of the Public Utility Commission of Texas, dated March 25, 1999 ..... 54a

TABLE OF CONTENTS – Continued

Page

APPENDIX E: Order of the United States Court of Appeals for the Fifth Circuit denying rehearing, dated October 19, 2005 ..... 59a

APPENDIX F: Relevant statutory and regulatory provisions 61a

TABLE OF AUTHORITIES

Page

CASES:

Abbot v. American Cyanamid Co., 844 F.2d 1108 (4th Cir.), *cert. denied*, 488 U.S. 908 (1988) 22

Aetna Health Inc. v. Davila, 542 U.S. 200 (2004) 23

American Paper Inst. v. American Elec. Power Serv. Co., 461 U.S. 402 (1983) 4, 23

Appeal of Pub. Serv. Co. of N.H., 539 A.2d 275 (N.H. 1988) 26

Bates v. Dow Agrosciences LLC, 125 S. Ct. 1788 (2005) 23

Boggs v. Boggs, 82 F.3d 90 (5th Cir. 1996), *rev'd*, 520 U.S. 833 (1997) 21

City of Morgan City v. South La. Elec. Coop. Ass'n, 49 F.3d 1074 (5th Cir. 1995) 21

Cogen Lyondell, Inc., 95 F.E.R.C. ¶ 61,243 (2001) 13, 29

Cogen Lyondell, Inc., 98 F.E.R.C. ¶ 61,182 (2002) 29

ConocoPhillips Co. v. Los Angeles Dept. of Water & Power, 110 F.E.R.C. ¶ 61,368 (2005) 10

Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000) 23

Diamond Multimedia Sys., Inc. v. Superior Ct. of Santa Clara County, 968 P.2d 539 (Cal.), *cert. denied*, 527 U.S. 1003 (1999) 22

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 11

English v. General Elect., 496 U.S. 72 (1990) 14

Exxon Co., U.S.A., 57 F.E.R.C. ¶ 62,173 (1991) 24

TABLE OF AUTHORITIES – Continued

Page

FERC v. Mississippi, 456 U.S. 742 (1982) 4, 6, 26

Freehold Cogeneration Assocs. v. Board of Regulatory Comm'rs, 44 F.3d 1178 (3d Cir.), *cert. denied*, 516 U.S. 815 (1995) 17, 18

Freightliner Corp. v. Myrick, 514 U.S. 280 (1995) 15

Geier v. American Honda Motor Co., 529 U.S. 861 (2000) 15, 17, 23

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 15

Great Plains Windpower, LLC, No. 29218, 2004 Tex. PUC LEXIS 27 (Aug. 30, 2004) 7, 28

Greensboro Lumber Co. v. Georgia Power Co., 844 F.2d 1538 (11th Cir. 1988) 18

Hines v. Davidowitz, 312 U.S. 52 (1941) 15

Houghton v. Department of Health, 57 P.3d 1067 (Utah 2002), *cert. denied*, 538 U.S. 945 (2003) 22, 23

Hurley v. Lederle Labs. Div. of Am. Cyanamid Co., 863 F.2d 1173 (5th Cir. 1988) 20

Independent Energy Producers v. California Pub. Utils. Comm'n, 36 F.3d 848 (9th Cir. 1994) 24

Ino Ino, Inc. v. City of Bellevue, 937 P.2d 154 (Wash. 1997), *cert. denied*, 522 U.S. 1077 (1998) 23

Iowa Power and Light Co. v. Iowa State Commerce Comm'n, 410 N.W.2d 236 (Iowa 1987) 19

Mid-Con Freight Sys., Inc. v. Michigan Pub. Serv. Comm'n, 125 S. Ct. 2427 (2005) 15, 23

Mississippi Indus. v. FERC, 808 F.2d 1525 (D.C. Cir. 1987) 10

Moss v. Merck & Co., 381 F.3d 501 (5th Cir. 2004) 20

TABLE OF AUTHORITIES – Continued

Page

Niagara Mohawk Power Corp. v. FERC, 117 F.3d 1485 (D.C. Cir. 1997) 30

Petition of New York State Gas & Elec., 71 F.E.R.C. ¶ 61,027 (1995), *recon. denied*, 72 F.E.R.C. ¶ 61,067 (1995) 24, 29

Power Res. Group, Inc. v. Public Util. Comm'n of Tex., 73 S.W.3d 354 (Tex. App.-Austin 2002), *rev. denied* (Tex. Oct. 10, 2002) 9, 10

Resource Tech. Corp. v. Illinois Commerce Comm'n, 822 N.E.2d 50 (Ill. App. Ct. 2004), *appeal denied*, 833 N.E.2d 9 (Ill. 2005), *cert. denied*, 126 S. Ct. 745 (2005) 18, 19

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 11

Savage v. Jones, 225 U.S. 501 (1912) 15

Smith Cogeneration Mgmt. v. Corporation Comm'n & Pub. Serv. Co., 863 P.3d 1227 (Okla. 1993) 18, 26

Southern Cal. Edison Co., 70 F.E.R.C. ¶ 61,215 (1995) 27

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) 14, 15

Sunnyside Cogeneration Assocs., 53 F.E.R.C. ¶ 62,029 (1990) 24

In re Talmage, No. 97-513, 1997 Me. PUC LEXIS 179 (Oct. 27, 1997) 20

CONSTITUTION, STATUTES, AND REGULATIONS:

U.S. Const. art. VI (Supremacy Clause) 1, 14

Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) 29

TABLE OF AUTHORITIES – Continued

Page

16 U.S.C. § 796(17) 4

16 U.S.C. § 796(18) 4

Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117:
16 U.S.C. § 824a-3 (Section 210) ..... *passim*
16 U.S.C. § 824a-3(a) 4
16 U.S.C. § 824a-3(b) 4
16 U.S.C. § 824a-3(d) 5
16 U.S.C. § 824a-3(f) 11
16 U.S.C. § 824a-3(f)(1) 6
16 U.S.C. § 824a-3(h)(2)(B) 10, 11
16 U.S.C. § 824a-3(m) 29

28 U.S.C. § 1254(1) 1

42 U.S.C. § 7171(e) 10

18 C.F.R. Pt. 292:
§ 292.101(b)(6) 5
§ 292.202(c) 4
§ 292.203-292.206 4
§ 292.203(a) 4
§ 292.207(a)(2)(B) 24
§ 292.207(a)(2)(D) 24
§ 292.301(b)(1) 5
§ 292.302(b) 8
§ 292.303(a) 7, 26
§ 292.304 25
§ 292.304(b)(2) 5, 8
§ 292.304(d)(2) 6

45 Fed. Reg. (1980):
12,218 ..... 5, 25
12,224 ..... 5, 6
12,230-12,231 6

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

Energy Info. Admin., U.S. Dep't of Energy, *Electric Power Annual 2004* (Nov. 2005), *available at* http://www.eia.doe.gov/cneaf/electricity/epa/epa_sum.html 2

Energy Info. Admin., U.S. Dep't of Energy, *Electric Power Monthly* (Jan. 11, 2006), *available at* http://www.eia.doe.gov/cneaf/electricity/epm/epm_sum.html 2, 27

Federal Energy Regulatory Commission, *2003 Annual Report* (2003) 10

Steven Ferrey, *Law of Independent Power: Development/Cogeneration/Utility Regulation* (8th rel. 2005) 26, 27

Note, *A Framework for Preemption*, 88 Yale L.J. 363 (1978) 17

Implementation of the Public Utility Regulatory Policies Act of 1978: Hearings before the Senate Comm. on Energy & Natural Resources, 99th Cong. (1986) 28

Independent Power Producers: Hearing before the Subcomm. on Energy Conservation & Power of the House Comm. on Energy & Commerce, 99th Cong. (1986) 25

Kenneth Starr *et al.*, *The Law of Preemption: A Report of the Appellate Judges Conference, American Bar Association* (1991) 21

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 422 F.3d 231. The opinions of the district court denying respondents' motion to dismiss on jurisdictional grounds (App., *infra*, 34a-53a) and granting respondents judgment as a matter of law (App., *infra*, 17a-33a) are unreported.

JURISDICTION

The court of appeals entered its judgment on August 17, 2005. A petition for rehearing was denied on October 19, 2005. App., *infra*, 59a-60a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * *, sh ll be the supreme Law of the Land."

Relevant provisions of the Public Utility Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95-617, 92 Stat. 3117, as amended, are reprinted in the appendix to this petition at App., *infra*, 61a-75a. Relevant regulations of the Federal Energy Regulatory Commission (FERC) are reprinted at App., *infra*, 75a-98a.

INTRODUCTION

The energy policy of our Nation is again on the front pages of our newspapers in light of the spike in crude oil prices and natural gas disruptions caused by recent hurricanes, continued concerns about reliance on foreign oil, the rising cost of coal, and the resulting rise in retail